U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date Issued: (7/1/99)

Case No.: **1998 INA 186**

In the Matter of:

C & C CAR CARE, INC., Employer,

on behalf of

LLOYD A. DAVID, Alien.

Appearance: P. W. Stingone, Esq., of Jamaica, New York, for the Employer and Alien
Certifying Officer: Delores DeHaan, Region II.

Before: Huddleston, Jarvis, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of LLOYD A. DAVID ("Alien") by C & C CAR CARE, INC., ("Employer") under § 212(a) (5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a) (5)(A) ("the Act") and the regulations promulgated thereunder, 20 CFR Part 656.[1] After the Certifying Officer ("CO") of the U.S. Department of Labor at Philadelphia, Pennsylvania, denied the application, the Employer requested review pursuant to 20 CFR § 656.26.

An alien seeking to enter the United States to perform either skilled or unskilled labor may receive a visa under § 212(a)(5) of the Act, if the Secretary of Labor has decided and

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c). Administrative notice is taken of the *Dictionary of Occupational Titles*, published by the Employment and Training Administration of the U. S. Department of Labor.

has certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the Alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. The requirements include the responsibility of an Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the state employment security agency and by other reasonable means to make a good faith test of U.S. worker availability.

STATEMENT OF THE CASE

Application. On September 20, 1996, the Employer applied for alien employment certification on behalf of the Alien to fill the position of "Auto Mechanic" in its Auto & Truck Repair business. The position was classified as "Auto Mechanic" under DOT Occupational Code No. 620.261-010[2]. Employer described the Job Duties as follows:

> Repair & maintain foreign & domestic autos & trucks with hand & power tools & diagnostic computerized equipment by removing & replacing worn & defective parts in gasoline & diesel engine systems & other automotive systems.

AF 17. The Employer's qualifications for the position were four years of experience in the Job Offered. The hours of this forty hour a week job were from 8:00 AM to 5:00 PM, at a salary of $710.80 per week with no overtime. *Id.*[3] Although five U.S. workers applied for the job, the

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[2] 620.261-010 **AUTOMOBILE MECHANIC (automotive ser.) alternate titles: garage mechanic**. Repairs and overhauls automobiles, buses, trucks, and other automotive vehicles; Examines vehicle and discusses with customer or AUTOMOBILE-REPAIR-SERVICE ESTIMATOR (automotive ser.); AUTOMOBILE TESTER (automotive ser.); or BUS INSPECTOR (automotive ser.) nature and extent of damage or malfunction. Plans work procedure, using charts, technical manuals, and experience. Raises vehicle, using hydraulic jack or hoist, to gain access to mechanical units bolted to underside of vehicle. Removes units, such as engine, transmission, or differential, using wrenches and hoist. Disassembles unit and inspects parts for wear, using micrometers, calipers, and thickness gauges. Repairs or replaces parts, such as pistons, rods, gears, valves, and bearings, using mechanic's handtools. Overhauls or replaces carburetors, blowers, generators, distributors, starters, and pumps. Rebuilds parts, such as crankshafts and cylinder blocks, using lathes, shapers, drill presses, and welding equipment. Rewires ignition system, lights, and instrument panel. Relines and adjusts brakes, aligns front end, repairs or replaces shock absorbers, and solders leaks in radiator. Mends damaged body and fenders by hammering out or filling in dents and welding broken parts. Replaces and adjusts headlights, and installs and repairs accessories, such as radios, heaters, mirrors, and windshield wipers. May be designated according to specialty as Automobile Mechanic, Motor (automotive ser.); Bus Mechanic (automotive ser.); Differential Repairer (automotive ser.); Engine-Repair Mechanic, Bus (automotive ser.); Foreign-Car Mechanic (automotive ser.); Truck Mechanic (automotive ser.). May be designated: Compressor Mechanic, Bus (automotive ser.); Drive-Shaft-And-Steering-Post Repairer (automotive ser.); Engine-Head Repairer (automotive ser.); Motor Assembler (automotive ser.). *GOE: 05.05.09 STRENGTH: M GED: R4 M3 L3 SVP: 7 DLU: 77*

[3] The Alien is a National of Guyana, who was living and working in the U. S. on a B-2 visa. Born 1954, he completed secondary school, and courses at a technical institute, where he studied automotive and automotive electrical technology from 1969 to 1976. He worked as a Motor Pool Supervisor and Automotive Mechanic for an airline in

Employer did not hire any of the candidates. AF 11.

Notice of Findings. On December 10, 1997, the Certifying Officer (CO) issued a Notice of Findings ("NOF") proposing to deny certification. AF 08-09. The CO found that the Employer failed to comply with 20 CFR §§ 656.20(c)(8) and 656.21(b)(6). §656.21(b)(6) provides that, if U. S. workers applied for the position and were rejected, the Employer is required to document that they were rejected solely for lawful job-related reasons. The regulations further provide at § 656.20(c)(8) that the job opportunity must clearly be open to any qualified U. S. workers. The NOF found that of the five referrals for this position two applicants, Mr. Higgins and Mr. Scarborough, were rejected on grounds that they did not contact the Employer, and that the Employer failed to disclose its efforts to contact them following the referral. The NOF explained that when the employer has the addresses and telephone numbers of applicants, the employer cannot simply state that he/she was unable to contact the applicant via telephone. An initial attempt at phone contact, and, if unsuccessful, following-up with a certified letter, is a minimally acceptable effort. A failure to contact applicants at all is essentially considered an untimely contact, and such actions indicate lack of a "good faith" recruitment effort. AF 09.

Rebuttal. The Employer's rebuttal was filed on December 26, 197. AF 07. The rebuttal consisted of a letter by the Employer's president, who explained and contested the NOF findings. He said Employer's failure to contact Mr. Higgins and Mr. Scarborough was due to a misunderstanding and oversight, as it did not read the addresses and telephone numbers of all the applicants on the second page of the letter it was sent by the state employment security agency on January 8, 1997. The Employer requested the opportunity to readvertise the position, arguing that its "acts of omission due to its innocent oversight should not be held to show a lack of 'good faith' in its recruitment efforts." AF 07.

Final Determination. The CO's Final Determination of January 22, 1998, denied alien labor certification. AF 04-06. The CO reviewed the record and the Employer's rebuttal of the NOF findings that it rejected qualified U. S. workers in violation of 20 CFR §§ 656.20(c)(8) and 656.21(b)(6). After the state agency provided Employer the addresses and telephone numbers of all five applicants in its January 24, 1997, letter, the Employer rejected two applicants, Mr. Higgins and Mr. Scarborough, because they failed to contact the Employer. Employer did not offer proof that it made any effort to contact these applicants, however. Noting that the NOF explained that when an employer has the addresses and telephone numbers of applicants, it cannot simply state that it was unable to contact applicants by telephone, the CO affirmed that the Employer's failure to contact the applicants indicated the absence of a "good faith" recruitment effort. Reviewing the state agency's letter in detail, the CO observed that it was "inconceivable that one could 'overlook' the second page of a document that was only two pages in length." The CO then said that the Employer's burden of proof required it to show that U.S. workers are not able, willing, qualified or available for this job opportunity, adding,

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Guyana from 1991 through most of 1995. From the beginning of 1996 to July 31, 1996, the date of application, the Alien was self-employed as an Auto Mechanic in an Auto Repair business in Brooklyn, NY.

> [Y]ou, the employer, bear the burden of providing evidence that the applicants are (1) not able to perform the job duties; (2) not willing to accept the job; (3) not qualified for the job opportunity; and/or (4) not available for the job opportunity. If an applicant fails to get in touch with an employer regarding the job opportunity, and the employer, therefore, claims this to be the reason for rejection, the employer has no proof that the referrals did not get in contact with him/her. Additionally, by the employer failing to contact or attempt to contact the referrals by telephone and making notations of same, and, if required, sending a certified follow-up letter, the employer has no proof that he/she made a good-faith effort to contact and consider all referrals. Therefore, the employer has not met the burden of proof showing the U. S. workers are not able, willing, qualified or available for the job opportunity.

Explaining that conducting a new recruitment process was not an option extended to the Employer by the NOF, the CO rejected the request stated in the rebuttal that it be permitted to readvertise the position to cure the violations. Based on Employer's admission in the rebuttal that it failed to contact two of the U. S. workers referred by the state employment security agency, the CO concluded that the Employer's own actions were viewed as the cause of its rejection of the U. S. job applicants, and denied alien labor certification.
AF 04-06.

Appeal. By its letter of February 17, 1998, the Employer appealed to BALCA. Counsel then recited the history of the recruitment, contending that the oversight was, in fact, the fault of Employer's attorney and not the Employer. Counsel also argued that the omission also was due to the letter to him from the state employment security agency, which was dated November 22, 1996, which he said was "vague and misleading," admitting that he had no prior experience with the recruitment procedures of the state agency. Finally, he faulted the state agency for not notifying him or his client of the defect in the recruitment report in time permit it to cure this oversight before referral to the DOL Regional Office. The Employer concluded by contending that under all of the circumstances of this case it had the right to rerecruit for this position, citing **A. Smile, Inc.**, 89 INA 001(Mar. 1, 1990) and **O'Mara**, 96 INA 113 (Dec. 11, 1997)(*en banc*).

Discussion

Burden of proof. As the CO's denial of alien labor certification was based on the Employer's failure to sustain its burden of proof, the Panel observes that labor certification is a privilege that the Act expressly confers by giving favored treatment to a limited class of alien workers, whose skills Congress seeks to bring to the U. S. labor market in order to satisfy a perceived demand for their services. 20 CFR §§ 656.1(a)(1) and (2), 656.3 ("Labor certification"). The scope and nature of the grant of this statutory privilege is indicated in 20 CFR § 656.2(b), which quoted and relied on § 291 of the Act (8 U.S.C. § 1361) to implement the burden of proof that Congress placed on certification applicants:

> Whenever any person makes application for a visa or any other documentation required for entry, or makes application for admission, or otherwise attempts to enter the United

> States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not subject to exclusion under any provision of this Act... .[4]

Moreover, since the Employer applied for alien labor certification under this exception to the broad limits of the Immigration and Nationality Act on immigration into the United States, which Congress adopted in the 1965 amendments, the Panel's deliberations concerning the award of alien labor certification are subject to the well-established common law principle that, "Statutes granting exemptions from their general operation must be strictly construed, and any doubt must be resolved against the one asserting the exemption." 73 Am Jur2d § 313, p. 464, citing **United States v. Allen**, 163 U. S. 499, 16 SCt 1071, 1073, 41 LEd 242 (1896).

Issue. As an employer must sustain the burden of proof as to all issues arising in the application, to establish entitlement to certification under the Act, the Employer in this case was required to show that its response to the referral of workers for this position was consistent with the requirement that it acted in good faith in the recruitment process. As a consequence, the issue referred to BALCA is whether the evidence of record supported the CO's finding that the Employer failed to sustain its burden of proving that it made a sufficient effort to contact the U. S. workers whom the state employment security agency referred for the Job Offered.

Analysis and Conclusion. Employer's violation of 20 CFR §§ 656.20(c)(8) and 656.21(b)(6) was based on its rejection of Mr. Higgins and Mr. Scarborough because they did not contact the Employer. *Supra*. Employer admitted that the referral letter contained names, addresses, and telephone numbers of all five U. S. workers, and that it did not attempt to contact any of the candidates submitted by the state agency. The Employer's explanation is that it simply overlooked the second page of a two-page letter that the state agency sent for the purpose of communicating those names, addresses, and telephone numbers. For these reasons the Panel infers that there is no fact for it to find, and the CO's decision was based on the undisputed evidence of record. The only question is whether the Employer should be permitted the opportunity to repeat the recruitment process.

Employer's reliance on the holdings in **A. Smile, Inc.**, *supra*, and **O'Mara**, 96 INA 113 (Dec. 11, 1997)(*en banc*), is mistaken. In **O'Mara** and in **Plant Adoption Center**, 94 INA 374 (Dec. 12, 1997)(*en banc*), we construed the rebuttal offers of employers to reduce unduly restrictive requirements and readvertise to retest the job market. Before these decisions were issued, such offers were conditioned by employers on the rejection of rebuttal arguments supporting the terms of the job requirements stated in their applications. When the holding in **A. Smile, Inc .**, was revisited *en banc* in **O'Mara** and **Plant Adoption Center**, we allowed the basic holding to stand, but held that where an employer failed to justify an unduly restrictive job

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[4] The legislative history of the 1965 amendments to the Immigration and Nationality Act clearly shows that Congress intended that the burden of proof in an application for labor certification is on the employer who seeks an alien's entry for permanent employment. See S. Rep. No. 748, 89th Cong., 1st Sess., reprinted in 1965 U.S.D. Code Cong. & Ad. News 3333-3334.

requirement the employer's offer to reduce the job requirement and readvertise must be unequivocal. No circumstance in the instant case is in any way similar or parallel or comparable to the facts considered in **A. Smile, Inc.**, **O'Mara**, and **Plant Adoption Center**, or in any of the cases that cited **A. Smile, Inc.**, prior to our *en banc* decisions in **O'Mara** and **Plant Adoption Center**.

There can be no question that these regulations are designed to implement the intent of Congress that a *bona fide* recruitment effort be made as a condition on which the grant of certification is expressly conditioned in every case. 20 CFR § 656.21(b)(1) graphically describes the exhaustive and diligent effort employers are expected to expend in recruiting U. S. workers for the Job Opportunity under the Act and regulations. While an employer's offer to readvertise is credible in a case where its overreaching unduly restrictive requirements can be reduced and the market retested, this Employer's failure even to read the second page of a two page letter giving it explicit notice of the addresses and telephone numbers where the job applicants can be reached cannot justify the application of this remedy it is considered in the context of the detailed instructions of 20 CFR § 656.21(b)(1). While the counsel's admitted inexperience explained his construction of the holdings in **A. Smile, Inc.**, **O'Mara**, and **Plant Adoption Center**, there was no excuse for the joint and several failure of both counsel and client to read every page of letters conveying critical information that the state agency sent to help the Employer carry out the recruitment process. Moreover, as Employer did not request permission to readvertise until after the NOF denied certification, it is clear that readvertising to cure Employer's failure to consider U. S. job applicants was not mentioned directly or by any inferences drawn from 20 CFR § 656.21 or from 20 CFR § 656.25, a regulation that described the administrative procedures to be followed following determination of an application for alien labor certification. For these reasons the Panel concludes that neither the equitable considerations asserted in the Employer's appellate brief nor the explicit regulations rules under which the alien labor certification process was conducted can support an order granting the relief it seeks.

On the other hand, the Employer's failure to establish that it made a diligent effort to contact these applicants is a material defect in the recruitment process. **Gorchev & Gorchev Graphic Design**, 89 INA 118 (Nov. 29, 1990)(*en banc*); **The First Boston Corp.**, 90 INA 059 (Jun. 28, 1991). As the failure to contact job applicants is considered to be "an untimely contact," the Employer's total failure to attempt to reach Mr. Higgins and Mr. Scarborough clearly indicated the lack of a good faith recruitment effort. Since the Employer failed to establish that it made a good faith effort to contact Mr. Higgins and Mr. Scarborough, its rejection of them for the sole reason that they did not contact the Employer violated 20 CFR § 656.21(b)(7); it further indicated that the job opportunity was not open to any qualified U. S. worker under 20 CFR § 656.20(c)(8); and, finally, it supported the inference that Employer failed to recruit in good faith. Certification was properly denied, as the principle is well-established under **H. C. LaMarche Enterprises**, 87 INA 607(Oct. 27, 1988), that the presumption that the employer is required to recruit in good faith is implicit in the procedural and substantive regulations governing alien labor certificaqtion. **Spellman High Voltage Electronic Corp.**, 93 INA 273 (Jun. 27, 1994). The CO's denial of certification is affirmed for

the reasons discussed above. Accordingly, the following order will enter.

Order

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the panel:

FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

SERVICE SHEET

Case No.: 98 INA 186
C & C CAR CARE, INC., Employer,
LLOYD A. DAVID, Alien.

Title : Decision and Order

I certify that on , 1998, the above-named document was mailed to the last known address of each of the following parties and their representatives:

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BALCA VOTE SHEET

Case No.: 98 INA 186
C & C CAR CARE, INC., Employer,
LLOYD A. DAVID, Alien.

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Jarvis			
Huddleston			

Thank you,

Judge Neusner
Date: November 25, 1998